No. 02-177

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES R. ALDRIDGE, SR., *et al.*,

Petitioners,

v.

GOODYEAR TIRE & RUBBER CO., INCORPORATED, an Ohio Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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INTRODUCTION

Respondent does not discuss the axiomatic directives for a plaintiff to be permitted discovery prior to a district court's consideration of summary judgment as set out in *Celetox Corp. v. Catrett*, 477 U.S. 317 (1986) and *Evans v. Technologies Applications & Service Company*, 80 F.3d 954 (4th Cir. 1994). This case does not present "a routine application of well-developed principles of law" as espoused by respondent. (Opp. Br. 2) The 4th Circuit in exasperation (*Aldridge VI*) opined that on remand (*Aldridge V*) the district court did not follow its instructions: "On remand, the district court held that the employees were *still* not entitled to discovery." (Emphasis original.) (Pet. App. 7)

Respondent's attorneys misrepresented the record in *McClelland v. Goodyear Tire & Rubber Company*, 629 F.2d 693 (4th Cir. 1991) (Table) to the district court below (Opp. Br. 21, n.16), indicating that the *McClelland* court had considered 16 sets of plaintiffs' expert interrogatory causation evidence (4th Cir. Br. App. 59-417) in opposition to the summary judgment motion therein. As revealed by the proceedings before Magistrate Judge Chasanow (*See*, Supp. App. 8) this evidence was not given evidentiary consideration inasmuch as it was not timely filed. The district court below referred to such evidence as having been considered in *McClelland* when relying on respondent's false representation. (Pet. App. 63)[1]

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[1] Respondent now spuriously contends that the interrogatories are in the *McClelland* record because they were lodged in the clerk's office and were discussed in appellate briefs by plaintiffs' counsel as "having been filed" in the case (Opp. Br. 22, n.17) – notwithstanding that the 4th Circuit had not considered such materials as part of the record evidence: "The absence of a preponderance of the evidence (or, indeed, of any [causation] evidence) . . . ." Respondent's attorneys (James K. Archibald, Esq., also attorneys in *McClelland*), to the contrary, by

(Continued on following page)

A. RESPONDENT'S RESPONSE TO STATEMENT OF THE CASE

Respecting note 3 (Opp. Br. 3), *Heinrich v. Goodyear Rubber & Tire Company*, 532 F. Supp. 1348 (D. Md. 1982) clearly recognized a cause of action under the Restatement (Second) of Torts, §324A, and respondent therefore had liability if proven by discovery. In contrast, the district court below not only did not allow discovery respecting that cause of action alleged by petitioners in the instant case, but improperly rendered factual findings on a motion for summary judgment: "Goodyear had no duty to warn Kelly-Springfield about the use or presence of chemicals supplied by others, including asbestos products" and that "Goodyear was not the guarantor of plant safety for Kelly-Springfield workers." (Pet. App. 66)

Respondent connotes, and again so misrepresents, that the *McClelland* court considered all discovery developed over a 1½ year period when entering summary judgment based on lack of proof of causation. (Opp. Br. 4; *Cf.* Supp. App.) As regards the group of cases in *Jewell v. Goodyear Tire & Rubber Company* (D. Md., Civ. No. S89-3285) (Opp. Br. 4, 6), the attorney in *Jewell*, Martin H. Freeman, Esq., also the attorney for plaintiffs in *McClelland* (Supp. App. 5), incorporated by reference the entire record of *McClelland* into *Jewell* (J.A.I 747-760) which was, therefore, concluded as was *McClelland*. (Mr.

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chicanery were instrumental in having such evidence excluded from record consideration in that proceeding (Supp. App. 9-10) (and falsely described the evidence to the Magistrate Judge as "nothing more than disguised legal memoranda and argument." (Supp. App. 3)) The interrogatories were lodged with the district court clerk's office on September 6, 1990 (J.A.II 1008-1009) and maintained separately from the record file, after Judge Smalkin considered the record *de novo*, developed before the Magistrate Judge, to enter summary judgment in *McClelland* on April 25, 1990. (J.A.II 1011)

Sack was not counsel in *Jewell*, had not participated in the proceedings, as he was not counsel in *McClelland*; his name had been erroneously affixed to one of the *Jewell* complaints by Mr. Freeman's office.)

When the district court below found that "the material facts [in *Aldridge*] and in *McClelland* are virtually identical" (Opp. Br. 5), it did so in reliance on respondent's repeated misrepresentations that they were "virtually identical." In addition to the fact that *Aldridge* has different plaintiffs and toxic injuries personal to them relating to their personal circumstances, the district court had not engaged in a comparison of the complaints of the two cases upon which discovery is predicated. A complaint is the starting point for discovery. *Cf. National Credit Union v. First Union*, 189 F.R.D. 158, 161 (D. Md. 1999), and cases cited therein.

The district court also found that the "same toxic chemicals are at issue here" (Opp. Br. 5), notwithstanding that petitioners' complaints allege that chemicals used in the Kelly plant were also manufactured by other suppliers and procured by Goodyear on behalf of Kelly (90%) as well as those manufactured by Goodyear, whereas the *Heinrich* and *McClelland* complaints alleged only chemicals used in the Kelly plant that were manufactured by Goodyear (10%). In the face of foreclosing discovery, the district court found that "Goodyear's data 'disclos[ed] every chemical used in the Cumberland plant since 1936.'" (Opp. Br. 13)

In recounting the district court proceedings leading up to the district court's first summary judgment (Opp. Br. 7), respondent omits petitioners' numerous, strenuous, requests for discovery, and the district court's directive for petitioners to file Rule 56(f) affidavits that it subsequently ignored – all prior to respondent's motion for summary judgment in which it raised the State exclusivity remedy issue, an alternative to the ground of *Aldridge* being "virtually identical" to *McClelland* so to compel summary judgment as in *McClelland*.

As Judge Smalkin advised that he would consider petitioners' Rule 56(f) affidavits (J.A.II 327-349, 350-360) concurrently with respondent's motion for summary judgment, subsequently filed on December 13, 1996, much of the material filed by petitioners in opposition to the motion was in furtherance of showing a need for further discovery. Petitioners distinguished, in detail, the elements and differences of *Aldridge* from the earlier cases, i.e., that they were not "virtually identical" – the alternative basis of respondent's motion for summary judgment – to which petitioners' 299 page opposition brief was largely addressed when filed on October 26, 1998 before Judge Harvey (reassigned). (Opp. Br. 12-13, n.13) Thereafter, respondent filed its summary judgment reply brief with exhibits, November 30, 1998, when raising the issue of lack of proof of causation for the first time – to which petitioners could not respond and filed a motion to strike. Judge Harvey rendered summary judgment on the causation issue based on the materials of record including the reply brief exhibits.[2]

It was incongruous for the district court to hold that "no new further material information could be discovered from Goodyear about the long-closed Kelly plant that could cure Petitioners' experts' dual failures to prove causation and/or satisfy the [Daubert] standard" (Opp. Br. 8-9) when the district court would not permit discovery in the first

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[2] Referring to notes 7 and 8 (Opp. Br. 7, 8), petitioners did their best to respond to the court proceedings with less than adequate discovery material, respecting their complaints, that were available to them from the *Heinrich* and *McClelland* cases since discovery was foreclosed to develop their own evidence, their Rule 56(f) affidavits were disregarded as showing a need for discovery, and that the district court (Judge Harvey) nonetheless proceeded to consider respondent's Rule 56(e) motion for summary judgment. Petitioners could hardly do otherwise.

instance that would illustrate the "new further material information."[3]

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[3] Goodyear's fraud on the court extends to grossly misrepresenting the nature and availability of documents in this case, referred to in the Rule 56(f) affidavits. "Goodyear has mortality studies and health records in its plants and the Kelly plant" (JA.II, 344-345, 350-353) that would be expected to establish the kinds of cancers, cardiovascular diseases and pulmonary diseases contracted by the workforce at the Kelly plant; and legal causes of diseases, based on epidemiological studies from raw data that Goodyear contracted. A 1979 mortality study of the National Institute of Occupational Safety and Health (NIOSH) of only 503 deaths, between 1968 and 1980, of workers in the Kelly plant demonstrated a statistical significance of arteriosclerotic heart disease and hermotopietric cancers of other lymphatic tissue, and ratio excesses for certain cancers with exposure to nitrosamines, which were potent carcinogens. (J.A. 967-1029) Goodyear has admitted in Goodyear litigation to five nitrosamines in the Kelly plant as carcinogens, as well as 25 other carcinogens. (J.A.II 433-434, 597-599, 601-607)

Goodyear has hidden death certificates from federal agencies (alleged in *Aldridge* (J.A. 226-227), but not in *McClelland*), and disobeyed NIOSH: "The company should continue monitoring the causes of mortality among ... the employees" (J.A. 989); and has hidden its morbidity and mortality raw data from the plant Union, the workforce including respondents, and government agencies, e.g., EPA, OSHA, National Toxicological Program (NTP), NCI that require disclosure. "*The strongest evidence for establishing a relationship between exposure to any given chemical and cancer in humans comes from epidemiological studies*. The human studies of exposure and cancer must consider the latency period of most cancer development since the exposure to a carcinogen often occurs many years (sometime 20-30 years or more) before the first sign of cancer appears." (Emphasis added.) 1998 *8th NTP Report on Carcinogens* (J.A.II 548) This is well known to Goodyear. Mortality studies at Kelly Cumberland could involve some 3500 factory deaths and low tens of thousands of deaths in other Goodyear tire plants. Evidence indicates that Goodyear's Biostatistician is now keeping this data secret as "Attorney Work Product" and has all the work files (J.A.II 1123) from all U.S. Goodyear plants including work for Goodyear's attorney (J.A.II 365), and has done internal mortality monitoring to determine causes of death (J.A. 989).

Whereas no death certificates from the Kelly Cumberland workforce or other Kelly plant, or any of the several (ten) Goodyear rubber tire chemical plants were produced in discovery in *Heinrich*, Goodyear

(Continued on following page)

Respondent misapprehends the import of Rule 56(f) affidavits. (Opp. Br. 9) The objective of such affidavits is to show the *need for discovery*, whereas respondent views them to be tantamount to a Rule 34 request for production of documents. When the need for discovery is shown, discovery is not limited to particular document production, and may include interrogatories and depositions. Moreover, it is fundamental that discovery is not limited to admissible evidence and that pursuant to Rule 26(b)(1), F.R.Civ.P. information may be discovered if the "information sought appears reasonably calculated to lead to discovery of admissible evidence." This is precisely what respondent has sought to foreclose. When discussing "a limited opportunity" for discovery, the 4th Circuit in *Aldridge IV* simply only foreclosed discovery that would be duplicative of discovery made available in the earlier cases.

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has misrepresented that such documents were produced in *Heinrich* and has concealed such critical data that would reveal causation evidence in this case. Goodyear has had in its possession in Akron death certificates (perhaps tens of thousands) from 1940 to 2001 from each of ten different rubber tire plants, *i.e.*: (1) its life insurance benefit program collects death certificates (10/27/2000 hearing, J.A.II 1122), (2) "We do have death certificates . . . boxes somewhere in Akron and they are in every plant in the world." (J.A.II 1123), (3) terminal hospitalization records in its Medical Benefit Program (J.A.II 642). Goodyear's attorney, an officer of the court, did not disclose these sources to the 4th Circuit and instead sought to confuse and mislead the panel. (1/23/02 Tr. 21-29)

Petitioners' Exhibit A of the Motion for Leave to Conduct Discovery on remand, September 18, 2000, further includes: "17. Identification of rubber worker epidemiologies based on workers at Goodyear plants and/or of any subsidiaries, and production of any that are unpublished; 18. Goodyear's studies on the causes of death and/or disease among workers at Kelly and/or Goodyear or at any subsidiary plant, the methodologies uses and the researchers conducting these." (J.A.II 277) These critical data for periods 1940 through 2000 were never furnished, and although available were concealed when respondent misled the district court and the 4th Circuit.

On remand (*Aldridge V*), as it was, counsel Henry Eigles, Esq. entered an appearance on behalf of one plaintiff and raised the fraud on the court issue. Rather than ignoring the mandate of the 4th Circuit (Opp. Br. 10-11), petitioners' counsel construed the mandate differently from that of respondent: that the district court should permit plenary discovery under the Federal Rules of Civil Procedure responsive to their requests, excluding discovery duplicative of that produced in the earlier cases. The discovery petitioners sought could not be "quite limited" as anticipated by the 4th Circuit based on respondent's false representations before the panel in *Aldridge IV*, that *Aldridge* was "virtually identical" to the earlier cases. Respondent misrepresents and deceives, and then seeks to avail itself of the results.

There was no violation of the "law of the case" doctrine as the district court opined during oral argument on October 27, 2000 (Opp. Br. 12) – at which the district court summarily denied counsel's motion for discovery, refused to permit counsel to speak, and proceeded to hear only from Mr. Nelson who failed to raise the fraud on the court issue. Respondents' submitted its selective "responsive documents" on remand under the guise of a bogus protective order, not pursuant to a Rule 34 request for production as allowed by the 4th Circuit. (Opp. Br. 11, n.11)

Contrary to respondent's assertions (Opp. Br. 14), during oral argument on appeal, *Aldridge VI*, petitioners stated with a degree of precision what they do need:

> [W]e want to have knowledge of the chemicals that was provided. They say, well, they provided us chemicals. But there were different time frames involved. Heinrich only went to 1984. The plant closed in 1987. Alright [sic], and so that even that discovery would have to be updated. . . . ¶ We don't have entire information as we need, there's pieces of it, but that is insufficient. We need to explore the [gamut] because in

> McClelland they only talked about chemicals which were manufactured by Goodyear. However, in our complaint Aldridge [ ] we speak of chemicals which were supplied by other manufacturers [ ] that Goodyear had ordered and specified – and that is about 90 percent of the chemicals that were used in the Kelly plant. . . . ¶ Now, further, as the court well knows, these are different plaintiffs. . . . They're not Heinrich plaintiffs, they're not McClelland plaintiffs, so each of these plaintiffs have their own toxic injuries, their own exposures, their own circumstances, even though they're all in the same workplace. ¶ Now then, [ ] we need information regarding these individual plaintiffs as to the effects of these exposures. As I said, Goodyear was the health insurer for health matters, and they have all the records of the health records of these employees and diseases and mortality rates and so on. ¶ And they have records of the whole work force and the experience with the whole work force. And the effects of exposures on the whole work force has a bearing on this in terms of what Goodyear knew.

(1/26/02 Tr. 12-14) (*See, too*, note 3, *supra*.)

B. RESPONDENT'S DISCUSSION

Respondent employs intemperate language: "mudslinging against Goodyear"; "outrageous and wholly unfounded charges against the district court," "these wild attacks on the district court go far beyond the pale of legitimate advocacy." (Opp. Br. 15-16)

However, the record demonstrates respondent's fraud on the courts, district court and 4th Circuit: its repetitive contentions of "virtually identical" and false commonality of the *McClelland* and *Aldridge* cases including the complaints and, therefore, that the *McClelland* record and decision should be controlling of *Aldridge* as was *Jewell* (disregarding the fact that the *McClelland* record was

incorporated by reference into *Jewell*). In reliance thereon the district court held that there was "sufficient commonality," a non-existing legal principle, to foreclose petitioners from engaging in discovery. And its misrepresentation in the district court below of the *McClelland* record that all expert interrogatory causation evidence in that case was given record consideration, on which, too, the district court relied.[4]

Respondent's reliance on *Sacher v. United States,* 343 U.S. 1, 9 (1952) is misplaced. (Opp. Br. 21) *Sacher* stands for the proposition that counsel may not go so far as to abuse the federal judicial system, albeit that "it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable." Systemic misrepresentations by counsel (i.e., course of conduct (*Id.* at 5)), fraud on the court, so that the "judicial machinery cannot perform in the usual manner its impartial task of adjudging" a case, is not a right. *Great Coastal Express, Inc. v. Intern'l Bhd. Of Teamsters*, 675 F.3d 1349, 1356 (4th Cir. 1982). The issue of fraud on the court can be raised at any time in the course of the proceedings and is not waived. *Id.* at 1357. (Opp. Br. 21)

And in the district court: a) discovery was foreclosed by two judges predicated on "sufficient commonality"

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[4] Respondent contends that at oral argument, the 4th Circuit "point[ed] out that the fraud allegations, while serious, 'lacked anything to back them up.'" (Opp. Br. 15). Not so. The panel queried: "I don't see that there's anything to back them up." Petitioners responded: "Well sir, the fraud on the court is the continual misrepresentations of Goodyear's counsel that the case of Aldridge is the same as the McClelland case. . . . Alright [sic], but there's another very important element and that is the misrepresentation of the McClelland record. . . ." (1/26/02 Tr. 3-6) Notwithstanding, the 4th Circuit, by panel and on petition for rehearing and rehearing en banc, did not address respondent's fraud on the courts and simply affirmed the district court's judgment, leaving the issue to be considered by this Court.

notwithstanding directives by this Court in *Celetox*, *supra*, and the 4th Circuit in *Evans*, *supra*, that a plaintiff is entitled to discovery prior to consideration of summary judgment; b) disregarded petitioners' Rule 56(f) affidavits showing need for discovery; c) considered petitioners' Rule 56(f) affidavits as Rule 56(e) affidavits when undertaking summary judgment proceedings; d) issued a bogus protective order on remand (*Aldridge V*) at the behest of respondent; and e) refused to follow the 4th Circuit's instructions to permit discovery responsive to petitioners' requests, albeit excluding discovery materials previously made available in *Heinrich* and *McClelland*.

In contrast to *Celetox* and *Evans*, respondent cites inapposite cases for the proposition of "the district court's right to cut off discovery where plaintiff cannot show that discovery could be reasonably expected to result in evidence sufficient to establish material disputes of fact that could defeat summary judgment." (Opp. Br. 17) Petitioners' Rule 56(f) affidavits and other materials filed in connection therewith, submitted at the direction of the district court, demonstrate the need for discovery and were so detailed and extensive that the district court considered them as Rule 56(e) affidavits when considering respondent's motion for summary judgment as to causation. (Opp. Br. 12-13, n.13)

CONCLUSION

The Court should grant the writ and reverse the judgment below.

Respectfully submitted,

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[ATTACHMENT TO FOURTH CIRCUIT COURT OF APPEALS APPELLANTS BRIEF]

VENABLE, BAETJER AND HOWARD
ATTORNEYS AT LAW

[Letterhead Omitted In Printing]

September 20, 1989

BY HAND

The Honorable Deborah K. Chasanow
United States District Court
for the District of Maryland
U.S. Courthouse
101 W. Lombard Street, Room 218
Baltimore, Maryland 21201

Re: Frances McClelland, *et al.* v. The Goodyear Tire & Rubber Company Civil No. S87-2622 and all cases consolidated therewith

(Filed Sep. 21, 1989)

Dear Magistrate Chasanow:

This letter sets forth in greater detail the grounds for Goodyear's objection to plaintiffs' apparent attempt at the September 15th hearing to introduce additional materials in opposition to Goodyear's motion for summary judgment. As I indicated at the hearing, when I received the 24 page "Response" to Goodyear's Reply Memorandum (ostensibly related to workmen's compensation issues) less than 24 hours before oral argument, I thought it would be the only attempt to introduce untimely materials in opposition to Goodyear's motion at a time when Goodyear would have no opportunity to respond to them. I was mistaken.

At or near the close of his oral argument on Friday, Mr. Freeman presented the Court with a stack of plaintiffs' interrogatory responses and related materials and stated something to the effect: "By the way, Your Honor, there are plenty more reasons for denying summary judgment if you care to peruse these documents." It is axiomatic that "[a] party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation." *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

We objected to this tactic on Friday and we renew our objection to it now. Mr. Freeman's untimely and unavailing attempt to bolster the plaintiffs' opposition (by bringing up and pointing to a six inch stack of interrogatory answers and other papers) clearly runs afoul of Local Rule 105 and the Federal Rules of Civil Procedure. Surely Rule 105's express prohibition of last-minute memoranda (such as that filed by plaintiffs late Thursday afternoon) also precludes plaintiffs' still later filing of a hodgepodge of interrogatory answers and related materials in a last ditch attempt to oppose Goodyear's pending motion.

Mr. Dunn and I telephoned Mr. Freeman yesterday (as you had suggested) to inquire as to the purpose of this last attempted filing. We couldn't get a straight answer. Whatever its purpose and content, however, the case law is clear that it is improper and should be disregarded.

As Goodyear noted in its Motion to Strike plaintiffs' unauthorized and untimely "Response" to Goodyear's Reply Memorandum, this Court afforded the parties over four months for responsive briefing and considered analysis of the issues (and facts) underlying Goodyear's motion

for summary judgment. At the last minute, plaintiffs twice have attempted to cloud the record by trying to slip in papers after the time for Goodyear's response. It would be fundamentally unfair to accept or consider these materials. *See Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D 384, 392 n.2 (D.P.R. 1981) ("Certainly, the Court's inherent power to control the proceedings before it entitles the Court to disregard a party's submission of untimely papers in opposition to summary judgment."); *DeLong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1140 (3rd Cir. 1980) (court properly refused to consider late affidavit in connection with summary judgment); *Jones v. Menard*, 559 F.2d 1282, 1285 (5th Cir. 1977) (court properly refused to consider opposition affidavit submitted on day of summary judgment hearing).

Goodyear has established that it would be unreasonable on the record in these cases for a jury to conclude that Goodyear, more likely than not, was a cause-in-fact of plaintiffs' cancers and other diseases. Plaintiffs, in opposing Goodyear's motion, have failed to meet their burden of rebutting this showing. The materials contained within their latest attempted filing add nothing. They do not contain the requisite "significant probative evidence" to defeat Goodyear's motion, even if accepted for filing. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

They do not address cause-in-fact as to Goodyear's conduct or products. They really are nothing more than disguised legal memoranda and argument. "But legal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion . . . " *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978),

cert. denied, 440 U.S. 981 (1979) (citation omitted). *See also Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

It is time for this charade to stop. The unprofessional and unfounded attacks on Goodyear and its counsel, the repeated disregard of the rules regarding timely filings, and the unsupported allegations and rhetoric all should end. The plaintiffs have failed to rebut Goodyear's demonstration that it is entitled to summary judgment. Summary judgment is compelled.

Very truly yours,

/s/ James K. Archibald
James K. Archibald
Counsel for Goodyear

JKA:ltj
7818R

cc: Martin H. Freeman, Esquire (VIA TELECOPY)
Court File

[FOURTH CIRCUIT COURT OF APPEALS
JOINT APP. II]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Frances McClelland
Individually and in her
capacity as Personal
Representative of the
Estate of Richard L.
McClelland, Deceased,

Plaintiffs,

THE GOODYEAR TIRE
& RUBBER CO., An Ohio
Corporation,

Defendants.

Docket No. S 87-2622

101 W. Lombard St.
Baltimore, MD 21201
January 12, 1990
9:30 a.m.

TRANSCRIPT OF SUPPLEMENTAL
ARGUMENT HEARING
BEFORE THE HONORABLE DEBORAH K. CHASANOW
UNITED STATES MAGISTRATE

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* * *

[68] year of which captive use was 9.18 million pounds per year – captive use meaning use in captive plants and those are the Kelly plants – and Exhibit 4 which has Morfax, Altax, Methyltuads, and Captax (Phonetic) which total 13 million pounds per year, all of which are Goodyear chemicals. I wasn't talking through my hat when I said that.

THE COURT: No, I understand that and I was aware of that. And, while the quantities sound enormous, do you have anything you can point to, to me, to relate those quantities to exposure levels?

MR. FREEMAN: I have experts who have testified that those particular – in their answers – at deposition and have also expressed opinion incorporated in the answers to interrogatories that those chemicals – because they know the chemical names, and I won't say it on the record here.

THE COURT: Right.

MR. FREEMAN: – because that's a matter of confidentiality – are sufficient to be substantial contributing causes of the disease.

Now, the only other comment I want to make to Your Honor is what Mr. Archibald had to say about always wanting to do more. Let me make clear, all I want to do is

not provide you with new information that wasn't available before their motion was ever filed. I just want the Court to have the benefit of the answers to interrogatories when it makes

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[69] its findings of fact and conclusions of law in terms of new documentation. New briefing has to do with law. I'm talking about facts. I don't know whether I'm even permitted to make reference to the answers to interrogatories as he made reference to things in the reply brief or exhibits attached to it, am I? Because I can point to you, right now, in places in here where the excess exposures that Dr. First was talking about as a result of his investigation were caused by specific activities of Goodyear, and it goes on for pages.

THE COURT: Okay. No, Mr. Freeman, my problem as [sic] been that a Court reviewing a Summary Judgment Motion should not – I mean, in our jurisdiction we don't file discovery materials as the general practice. They can be filed if there's a request and there's good reason. But that has nothing to do with what a Court ought to look to in deciding a Summary Judgment Motion. That in order to do that, I ought to be able to look at the papers that were filed, the motion, the attachments.

MR. FREEMAN: I understand.

THE COURT: And I shouldn't have to, nor should Judge Smalkin, go just generally to discovery materials –

MR. FREEMAN: I understand that.

THE COURT: – to decide it. That what his normal scheduling order, and I went back to check this morning, what he did way at the beginning was state that in any summary

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[70] judgment litigation, the party opposing summary judgment was to list what it contended were the material facts in dispute that required denial of summary judgment.

MR. FREEMAN: I understand that, too.

THE COURT: That, I don't think you did, in precisely the format you would have expected to do.

MR. FREEMAN: Well, what happened here –

THE COURT: And I understand what you claim is that when you did respond, you responded to what you perceive to be the issues, and that may not be, in fact, what Goodyear thought it was raising, or perhaps how I might have viewed what they were raising, or most importantly, what Judge Smalkin might think that they were raising.

MR. FREEMAN: all right. That can be cured very simply.

THE COURT: But now I understand where you are. I am not – and *I am not going to suggest to Judge Smalkin that he take those answers to interrogatories and find support, if it's necessary.* [Emphasis added.]

MR. FREEMAN: What I am asking you is, if I'm right that the issue which was thought to be the one that was going to be focused on and which these answers to

interrogatories were prepared in anticipation of was not the focus of the motion as filed, but became the focus, as is now clear in the argument, two arguments, then the matter that you have raised

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[71] can be cured and should be cured not by allowing us to go out and get new information, but simply to respond in writing to things which – to the focus which has now been returned to by counsel. In litigation that has gone on for years, to go off on a circumstance that has been created by, from my perspective, what was misleading to me in the motion that was filed, would be not justice; it would be real lawyering, in my view.

I am simply asking for an opportunity to respond to what now has been made a focus that was not perceived to be made a focus, and it is not asking to go outside that which has been produced previously. It is simply asking to put in the documents that you and Judge Smalkin can look at that which was created before the motion was ever even filed. That's not –

THE COURT: What happened in my preparation of the report was that as I got into the issue the plaintiffs thought was raised, and that was to focus on Goodyear's conduct and how it led, if at all, to the exposure, was that it's not particularly helpful to look at that issue in a vacuum without knowing how whatever level of exposure then gets you to the injuries –

MR. FREEMAN: That's –

THE COURT: – that are alleged in this case.

MR. FREEMAN: That's –

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[72] THE COURT: And that I'm not sure – what I may come down to is that it is just not a helpful process, whether Goodyear intended to raise it that way or not, to look at it in that kind of vacuum. And I have to get to the fairness issue and do some real thinking about what further briefing, if any, would be appropriate at this stage of the proceedings. I hope I've –

MR. FREEMAN: Well, if you understand what our concern is –

THE COURT: – understand –

MR. FREEMAN: – then, that's fine.

THE COURT: You've made that part – that part of it is clear, and that's what I thought from the what happened at the last hearing when you offered those and the issues that came up in the letters that were exchanged right after that. I, of course –

MR. FREEMAN: Can you perceive of any reason why I, after bringing my experts to consult with me at great expense to my clients and preparing the answers to interrogatories, can you think of any reason I would have just said, "Well, I'm not going to file any of this, or I'm not going to incorporate it," if I honestly didn't think that wasn't the focus of the motion?

THE COURT: No, of course –

MR. FREEMAN: Where's the fairness in that? All

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